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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 882

FRANK COSTELLO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, pp. 48a–58a) is reported at 311 F. 2d 343.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1962. The petition for a writ of certiorari was filed on February 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an alien who has been divested of United States citizenship by reason of fraud

in its procurement, may be deported on the basis of convictions which occurred prior to such divestment.

2. Whether the convictions for evasion of income taxes in separate years were for offenses not arising out of a single scheme of criminal misconduct.

3. Whether wilful evasion of taxes is a crime involving moral turpitude.

STATUTE INVOLVED

Section 241(a) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. 1251(a), provides in pertinent part:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

STATEMENT

Petitioner, who was born in Italy, entered the United States as an alien in 1895 and was naturalized in 1925. In 1954, petitioner was convicted of having wilfully and knowingly attempted to defeat and evade the payment of income taxes by filing a false and fraudulent income tax return for the years 1948 and 1949. See *Costello* v. *United States*, 350 U.S. 359. In 1959, his citizenship was revoked because of fraud in its procurement. See *Costello* v. *United States*, 365 U.S. 265.

In 1961, proceedings were commenced to have petitioner ordered deported under Section 241(a)(4) of the Immigration and Nationality Act, as an alien who, subsequent to entry, had twice been convicted of "crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," *i.e.*, income tax evasion for the years 1948 and 1949. At the hearing, conducted pursuant to Section 242(b) of the Act, the government offered in evidence the record of the convictions. Petitioner declined to testify. He requested, however, that a subpoena be issued ordering the appearance of the attorney who had represented him at the income tax prosecution for the purpose of adducing evidence on the question of whether the income tax convictions "related to the crimes arising from a common scheme." This request was denied, the inquiry officer ruling that, since the attorney had not testified at the income tax trial, his testimony now would not be germane to the question of a "single scheme." Petitioner was given the opportunity to submit affidavits on the subject by the lawyer or anyone else, but declined to do so. The Special Inquiry Officer, upon the record before him, concluded that petitioner was deportable. The Board of Immigration Appeals sustained this order. A petition to the court of appeals for review of the deportation order was dismissed, the court holding that petitioner had properly been found deportable.

ARGUMENT

1. Petitioner contends (Pet. 11) that he was not deportable under Section 241(a)(4) of the Immigra-

tion and Nationality Act, *supra*, p. 2, because at the time he was convicted he was not an alien. In fact, however, petitioner was an alien when convicted. His naturalization was subsequently held to be void *ab initio* on the ground that it was procured by fraud.[1]

Furthermore, even if petitioner is considered to have been a citizen at the time of his conviction, Section 241(a)(4) still provides for his deportation. That section requires for deportability proof (1) that the person is an alien and (2) that, after entry, he had been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. Petitioner does not dispute the finding that he is an "alien" as that term is defined in Section 101(a)(3) of the Act and, that subsequent to his entry into the United States in 1895, he was convicted of wilful evasion of income taxes for the years 1948 and 1949.

Petitioner's claim that the statute applies only to persons who were aliens when convicted is incon-

[1] *United States ex rel. Brancato* v. *Lehman*, 239 F. 2d 663 (C.A. 6), is not inconsistent with this argument. There, the court was construing a provision of the Immigration Act of 1917 stating that an alien sentenced to a year or more for a crime involving moral turpitude committed within five years of entry shall be deportable. The court held that the particular statute meant by entry only persons who were then aliens, not persons who had been naturalized even though illegally. This case involves an entirely different statute which does not require for deportability that the convictions were within a certain period after entry. It is enough that the person be convicted at any time. And it is significant that *Brancato* did not hold that the convictions which occurred when the person was ostensibly a citizen did not come within the statute if they were within the statutory time period.

sistent with its clear words. Section 241(a)(4) specifically applies to any alien who "at any time after entry is convicted of two crimes involving moral turpitude." In terms, this provision applies whether or not the person was an alien when convicted. This view is strongly supported by this Court's decision in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521. In *Eichenlaub* this Court held that a statute making deportable "[a]ll aliens who since August 1, 1914, have been or may hereafter be convicted" of violations of the Espionage Act of 1917, did not require that the offenders have the status of aliens at the time they were convicted. Petitioner's argument that *Eichenlaub* is inapplicable because the statute involved there used the phrase "have been * * * convicted" and Section 241(a)(4) uses the phrase "is convicted" is without merit. There is no substantial difference between these two phrases. Indeed, this Court has paraphrased Section 241(a)(4) as providing for "the deportation of an alien who 'at any time after entry' *has been* convicted of two crimes involving moral turpitude" (emphasis added). *Lehmann* v. *United States ex rel. Carson*, 353 U.S. 685, 689.[2]

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[2] In *Mangaoang* v. *Boyd*, 205 F. 2d 553, 554 (C.A. 9), certiorari denied, 346 U.S. 876, the court of appeals held, as one of two grounds for decision, that a person born in the Philippines, who entered this country as a national and who was for a short time a member of the Communist Party, could not be deported after losing his American nationality by operation of law when the Philippines became independent in 1946. That case involved a section of the Immigration Act of 1917 providing for the deportability of "[a]liens who, at any time, shall be or shall have been members of any of the following classes: * * * (C)

Petitioner argues that, since he was not an alien at the time of his conviction, he could not take advantage of the provisions of Section 241(b)(2) of the Act, which provides that Section 241(a) shall not apply "if the court sentencing such alien for such crime shall make * * * a recommendation to the Attorney General that such alien not be deported." The answer to this contention is simply that it was petitioner's own act of fraudulently obtaining citi-

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Aliens who are members of * * * the Communist Party of the United States." The court said that subsection (C) required that the person be an alien when a Party member. This follows from the fact that "alien" is used in the 1917 Act both to state what group of persons are subject to the deportation provisions and to state what acts must occur to be deportable. In contrast, Section 241(a)(4) uses "alien" only to state what persons are subject to the deportation provisions; the act justifying deportation is conviction of two crimes.

Resurreccion-Talavera v. *Barber*, 231 F. 2d 524, 525 (C.A. 9), involved a person who was also an American national by reason of birth in the Philippines and who was convicted of a crime involving moral turpitude. The court held he was deportable after he lost his American citizenship in 1946 because he "was convicted * * * prior to entry" of a crime involving moral turpitude. In reaching this decision, which is, of course, consistent with the holding below in this case, the court of appeals apparently distinguished *Mangaoang* v. *Boyd* on the ground that *Mangaoang* involved a statute applying to "aliens who *are* members of * * * the Communist Party" (emphasis in original) while *Resurreccion-Talavera* concerned a statute involving aliens who *were* convicted. We submit that this distinction of the *Mangaoang* case on the basis of the tenses of the verbs used is unnecessary (for the reasons stated with regard to the *Mangaoang* case) and erroneous.

The most that can be said as to these two cases is that they are to some extent inconsistent with one of two independent grounds relied on by respondent here. They do not relate at all to the ground that petitioner was an alien when convicted. And they involved entirely different statutes.

zenship that prevented him from taking advantage of Section 241(b)(2). The case of *Gubbels* v. *Hoy*, 261 F. 2d 952 (C.A. 9), which is cited by petitioner (Pet. 11), has no application here. There the court, in deciding that adjudication of guilt by a court martial was not a "conviction" within the meaning of Section 241(a)(4) of the Immigration and Nationality Act, gave, as one of the reasons for its conclusion, the fact that in such a situation there is no judge capable of making a recommendation under Section 241(b)(2). But a federal district judge, of course, may recommend a pardon for aliens. Petitioner's inability to ask for such relief because of his claim of citizenship stemmed entirely from his own fraud.

Congress clearly has the power to provide that a person presently an alien may be deported for past crimes, whatever his status when the crime was committed. The present statute was designed to broaden the grounds for exclusion and deportation of criminal aliens. H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), p. 28. It reflects a Congressional judgment that an alien who, after entry has been proved, by judicial conviction for two or more crimes, to be a member of the criminal class, should not continue to reside in the United States. Petitioner is just such an alien. He should not be treated differently from other aliens who commited similar crimes merely because he fraudulently managed to obtain citizenship.

2. Petitioner's conviction for wilful evasion of income taxes for the years 1948 and 1949 was a conviction of "two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," as that phrase is used in Section 241(a)(4) of the Immigration and Nationality Act. The evasion of income taxes by false returns in two successive years may or may not involve similar methods but, from the very nature of the crime, the evasion cannot be the result of a single scheme. Each return filed must necessarily state income and expenditures for a particular year, so that falsification for any one year must necessarily relate to events which did not take place the year before. Even though a person might plan to conceal income from the very same business in two separate years, he cannot, in one year, be certain what his income and expenditure will be in the next. Since returns must be filed yearly, the crime of willful evasion is fully complete when the return is filed for the year in question; the next year must necessarily involve different events and different calculations widely separated in time, whether or not the method of deception is similar to that used the year before. Consequently, the courts have held that the crime of wilfully and knowingly filing a false and fraudulent return intending to defeat or evade any part of the tax is not a continuing offense. *Myres* v. *United States,* 174 F. 2d 329, 334 (C.A. 8), certiorari denied, 338 U.S. 849; *United States* v. *Croessant,* 178 F. 2d 96, 98 (C.A. 3), certiorari denied, 339 U.S. 927.

The separateness of tax evasion for different years is clear whether or not the government undertakes to prove evasion by the "net worth" method. This is illustrated by the decision in petitioner's own case. Of the four years for which petitioner was tried (1946 to 1949), the jury acquitted as to the first. The court of appeals reversed as to the second year, because it was possible, on the "net worth" theory, that petitioner had sufficient cash reserves to account for the understated income before 1948, but not for the amount that would be necessary for 1948 and 1949. See 221 F. 2d 668, 671. The offenses relating to the last two years, of which petitioner was convicted, were likewise two separate and distinct crimes.

Congress certainly did not intend to grant immunity from deportation to those who over a period of time pursue a course of criminal misconduct, involving numerous successive, separate crimes which were consummated at different times, merely because the crimes may have been committed in the same manner, or with the same associates, or even by the use of the same fradulent devices. The government adquately showed conviction of two crimes not arising out of a single scheme when it showed that petitioner had been convicted by willful evasion by making false returns in two separate years. Even assuming that it is ever possible for false returns to be part of a single scheme, it would be up to petitioner to present evidence contradicting the *prima facie* case made by the fact of conviction for two separate years. Petitioner was not, as he claims, kept from making such showing

by the fact that the inquiry officer declined to issue a subpoena for his attorney at the income tax trial. No claim was made that the attorney would or could testify to the facts beyond those brought out at the trial. No affidavit was offered as to any facts although the opportunity was given to do so. In the petition here all that is claimed is that the lawyer would have given an analysis of the tax evasion case and the reasons for his trial strategy (Pet. 24). None of this would go to show that false returns filed a year apart were not separate and distinct acts. Petitioner did not have to endeavor to show a single scheme by his own testimony, but he did have to offer *facts* as distinct from legal argument. This he never attempted to do.

Decisions relied upon by petitioner (Pet. 13–19), involving different crimes based on different facts, cannot be deemed in conflict with the decision below. As to the particular question here, whether evasions of taxes by false returns in successive years, are separate crimes for the purposes of Section 241(a)(4) of the Immigration and Nationality Act, there is no conflict of decisions. To the contrary, the decision of the Ninth Circuit in *Kahn* v. *Barber,* 253 F. 2d 547, certiorari denied, 357 U.S. 920, is in full accord with the decision below.

3. To support the charge of wilfully and knowingly attempting to defeat and evade income taxes for the years 1948 and 1949 by filing false and fraudulent returns, the government was required by law to show that petitioner had a specific intention to evade

taxation tantamount to an intent to defraud. *United States* v. *Rosenblum*, 176 F. 2d 321, 329 (C.A. 7), certiorari denied, 338 U.S. 893; *United States* v. *Martell*, 199 F. 2d 670 (C.A. 3). Indeed, petitioner was specifically charged with and convicted of filing "false and fradulent income tax return[s]" (R. 95). Crimes in which fraud is proved as an ingredient of the offense are crimes involving moral turpitude. *Jordan* v. *De George*, 341 U.S. 223. Petitioner was therefore properly found to have been convicted of two crimes involving moral turpitude.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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